

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, ex
rel., RANDOLPH PETERSON and
TRI-CITY RAILROAD COMPANY,
LLC.

Plaintiffs,

V.

PART OF BENTON COUNTY, et al.,

Defendants.

NO. 2:17-CV-0191-TOR

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST THE CITY
OF RICHLAND

BEFORE THE COURT is Plaintiffs Randolph Peterson and Tri-City Railroad

Company, LLC's Motion for Partial Summary Judgment Against the City of Richland

(ECF No. 87), Motion to Strike (ECF No. 104), and Motion to Expedite (ECF No.

105). These matters were submitted for consideration without a request for oral

argument. Defendants the City of Richland and the Port of Benton filed a Response.

The Court has reviewed the record and files herein, and is fully informed

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST THE CITY OF RICHLAND ~ 1

1 Plaintiffs' request to strike Defendant City of Richland's Sur-Reply and
2 corresponding request to expedite (ECF Nos. 104; 105) are **denied as moot**, as the
3 Court does not rely on the complained of briefing for this Order. For the reasons
4 discussed below, the Motion for Partial Summary Judgment (ECF No. 87) is **denied**.

5 **BACKGROUND**

6 The pending motion for summary judgment concerns alleged retaliation by the
7 City of Richland against Plaintiff Tri-City Railroad Company, LLC ("TCRY") for
8 successfully petitioning the United States Surface Transportation Board ("STB") for
9 relief from the City of Richland's efforts to create an at-grade crossing over railroad
10 tracks leased by TCRY. As discussed more fully below, TCRY alleges the City of
11 Richland retaliated by creating a "Southern Connection Options List" and by
12 threatening suit against the Union Pacific Railroad ("UP"), among other things. The
13 following provides the context for Plaintiffs' allegations.¹

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16 ¹ Where disputed, the facts and inferences are construed in favor of the non-
17 moving party—although the Court notes that there are few factual issues in
18 dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (in reviewing a
19 motion for summary judgment, the "evidence of the non-movant is to be believed,
20 and all justifiable inferences are to be drawn in [the non-movant's] favor").

1 **1. TCRY's leasehold interest in tracks owned by the Port of Benton**

2 The Port of Benton (the "Port") owns approximately 16 miles of railroad
3 trackage, which is generally referred to as the "Southern Connection." ECF No. 97 at
4 2, ¶ 4. In 2002, TCRY began leasing the trackage from the Port and agreed to
5 maintain the tracks and pay monthly rent, *inter alia*. ECF No. 88-3. Relevant to the
6 pending motion, the southern end of the track runs between Gage Boulevard and
7 Tapteal Drive, passing through the City of Richland and into the City of Kennewick, at
8 what is called the "Richland Junction".

9 **2. Center Parkway crossing – initial efforts**

10 In 2001, before TCRY acquired its leasehold, the City of Kennewick and the
11 City of Richland had already "began a coordinated effort" to create an at-grade railroad
12 crossing (the "Center Parkway Extension") over two sets of tracks—one set owned by
13 the Port (and subsequently leased to TCRY) and the other owned by UP. ECF No. 95
14 at 4; 98 at 2-3, ¶ 2; ECF No. 93-2 (2001 agreement between City of Kennewick and
15 City of Richland regarding preparation for Center Parkway crossing); *see* ECF No. 93-
16 4. The crossing was part of a plan between the City of Kennewick and the City of
17 Richland to connect commercial retail centers between the two cities by extending
18 Center Parkway Road over the tracks, connecting Gage Boulevard and Tapteal Drive.
19 ECF No. 95 at 4. Because the plans called for an at-grade crossing over the Port's
20

1 tracks, “the proposed project was hostile to the Port’s property interests” as owner and
2 TCRY’s leasehold property interest. ECF No. 95 at 4-5.

3 In April of 2004, the City of Kennewick, in conjunction with the City of
4 Richland, petitioned the Washington State Utilities & Transportation Commission
5 (“WUTC”) to obtain “an at-grade crossing of Center Parkway over the Union Pacific
6 railroad spur west of the Richland Junction[.]” ECF No. 89 at 3, ¶ 4. In November
7 2005, at UP’s request, Kennewick’s petition to cross TCRY tracks at Center Parkway
8 was consolidated with the first petition. ECF No. 89 at 3, ¶ 5.

9 According to the Port, “[t]he Port recognized that Richland and Kennewick had
10 compelling arguments that could likely support efforts to condemn the Port’s property
11 in favor of extending Center Parkway over the Port-owned railroad track.” ECF No.
12 95 at 5; *see* ECF No. 88-4 (petition). As such, “[r]ather than risk losing the ability to
13 participate in how its interests would be impacted, in 2006, the Port entered into a
14 Railroad Crossing Agreement [] with Richland and Kennewick” where “the Port
15 agreed to grant the cities a crossing easement over its trackage” and the cities agreed
16 “to obtain authority for the crossing from the Port’s lessee, TCRY, or to obtain legal
17 authority (e.g., authority from the court) for the proposed crossing.” ECF No. 95 at 5-
18 6.

19 “In 2007, WUTC rejected Kennewick’s . . . petitions for the at-grade crossing
20 over UP and TCRY tracks at Center Parkway[.]” ECF No. 89 at 4, ¶ 7.

1 Over the course of the next few years, the City of Richland continued to pursue
2 its goal of securing the Center Parkway crossing. *See* ECF No. 89 at 4-8, ¶¶ 8-25. In
3 particular, the City of Richland entered into a Standard Form Railroad Track Use
4 Agreement (“SFRTUA”) with UP in April of 2011. ECF No. 89 at 7, ¶ 15. The
5 agreement included the declaration that “the City desires that all railroad interchange
6 operations at Richland Junction be permanently eliminated[.]” ECF No. 89 at 5, ¶ 16.
7 As part of the agreement, UP agreed to “secure[] all agreements necessary with Tri-
8 City Railroad Company, LLC . . . to permanently relocate the UP/Tri City Railroad
9 interchange from Richland Junction and the path of Center Parkway.” ECF No. 89 at
10 7, ¶ 22. UP also reserved the right “to name an agent to handle UP rail traffic to and
11 from industries located along the Track” and “named TCRY as its agent to handle UP
12 rail traffic to and from industries located on the Horn Rapids Rail Spur.” ECF No. 89
13 at 8, ¶¶ 24-25.

14 **3. Second WUTC petition for crossing; TCRY’s “protected” conduct**

15 On April 8, 2013, the City of Kennewick filed another petition with the WUTC
16 to construct an at-grade rail crossing at Center Parkway. ECF No. 89 at 8, ¶ 27. On
17 May 31, 2013, the City of Richland filed a motion to intervene with the WUTC in
18 support of the City of Kennewick’s petition; the motion was granted on June 4, 2013.
19 ECF No. 89 at 8, 28. In November, 2014, TCRY received notice of the petition. ECF
20 No. 89 at 9, ¶ 29. The WUTC “approved the extension of Center Parkway between

1 Kennewick and Richland” and the Superior Court for the County of Benton,
2 Washington affirmed the WUTC orders on December 9, 2014. *See Tri-City R.R. Co.*
3 *v. State of Washington*, Benton County Cause No. 14-2-07894-8; ECF No. 88-24 at 2.

4 On March 19, 2015, TCRY petitioned the United States Surface Transportation
5 Board (STB) “for a declaratory order seeking preemption of Kennewick and
6 Richland’s efforts at Richland Junction to protect its railroad operations and leasehold
7 rights.” ECF No. 89 at 9, ¶ 30 (emphasis own).

8 “On May 7, 2015, Kennewick and Richland filed a petition for condemnation
9 with the Benton County Superior Court for an easement across TCRY tracks at
10 Richland Junction for an at-grade-crossing.” ECF No. 89 at 9, ¶ 31.

11 “On September 12, 2016, the STB issued a declaratory order preempting
12 Kennewick and Richland’s attempt at condemnation and denying the City of
13 Richland’s request for an at-grade crossing[;] Richland subsequently appealed the STB
14 declaratory order to the Ninth Circuit Court of Appeals.” ECF No. 89 at 10, ¶ 33.

15 **4. Southern Connection Options List**

16 Plaintiffs assert the City of Richland, through the firm Fletcher & Sippel, created
17 the so-called “Southern Connection Options List” out of retaliation for TCRY
18 petitioning the STB. The Port paints a much different picture—according to the Port,
19 the Port hired the firm Fletcher & Sippel to create the Options List and City of
20 Richland played no part in its formation. ECF No. 95 at 9-10. The Port further asserts

1 the Options List had nothing to do with the Center Parkway project, and provides an
2 explanation as to the origin and purpose of the Options List, as detailed below.

3 According to the Port, the Horn Rapids Industrial Park—an industrial area
4 located at the opposite end of the Southern Connection from the Richland Junction
5 (approximately 12 miles away)—began seeing economic growth in 2012. ECF No. 95
6 at 8. Due to the expected increase in rail traffic, the Port hired a railroad consulting
7 firm, Tangent Services, Inc., to advise the Port on how to best utilize its railroad assets
8 to support economic development. ECF No. 95 at 8.

9 Around this time, the Port “began questioning whether TCRY was meeting its
10 lease obligations and properly maintaining the Port’s trackage” and these “concerns
11 were compounded by the fact that TCRY refused to provide the Port with any
12 maintenance records” while “representing that it was not required to maintain the track
13 at any specific Federal Railroad Administration standard, which the Port disputed.”
14 ECF No. 95 at 9. “The Port decided to consult with an attorney who focused on
15 railroad law to advise the Port on the terms of the lease, including TCRY’s
16 maintenance obligations” and “[a]s the Port’s concerns about TCRY grew, in early
17 2016, the Port asked Fletcher & Sippel to work with Tangent to analyze the Port’s
18 contractual rights and obligations for its rail line, including its lease with TCRY.”
19 ECF No. 95 at 9.

20 According to the Port, “[b]etween January and August 2016, Tangent and

1 Fletcher & Sippel collected information and conducted the requested analysis, which
2 included drafting a memo entitled ‘The Southern Connection Options List.’” ECF No.
3 95 at 9-10.

4 The Port received the Southern Connection Options List on or about August 31,
5 2016. ECF No. 95 at 10. The Options List “contained 15 different options for the Port
6 to consider – everything from selling the trackage, to developing alternative funding
7 sources, to evicting TCRY, to doing nothing.” ECF No. 95 at 10. According to the
8 Port, it “did not adopt any of the options other than to continue with the status quo –
9 any other option would have required a vote of the Port Commissioners, which did not
10 happen.” ECF No. 95 at 10.

11 The Port avers that “[t]his work was done solely for the Port[,] was never meant
12 for dissemination of any kind[,]” and that “[t]he Port did not share the Options List (or
13 any information about the analysis it had requested) with Richland[,]” noting that “the
14 Options List was headed in bold with the phrase ‘Privileged and Confidential
15 Attorney-Client Communication’ and the Port considered it confidential legal
16 analysis.” ECF No. 95 at 10. According to the Port, TCRY only received the Options
17 List after submitting a public record request in the summer of 2017. ECF No. 95 at 11.
18 On August 8, 2017, TCRY forwarded the Options List to the City of Richland; the City
19 of Richland was not aware of the list beforehand. ECF Nos. 91 at 10; 95 at 11.

20 According to the Port, “[a]fter TCRY received the list, it demanded the Port

1 identify what option the Port intended to adopt” but “[t]he Port repeatedly told TCRY
2 that the list was nothing more than an analysis from an outside consultant and that the
3 Port had no plan to undertake any of the options.” ECF No. 95 at 11.

4 **5. City of Richland gives UP notice of breach due to TCRY opposition**

5 On July 26, 2017, Wimbish sent an e-mail to UP’s attorney Jeremy Berman. In
6 the e-mail, Wimbish relayed the City of Richland’s stance that the UP is in breach of
7 the 2011 SFRTUA between the City of Richland and UP. ECF No. 88-37; *see supra*.
8 In the e-mail, Wimbish notes that the SFRTUA requires UP *and its agents* (which
9 includes TCRY) to not oppose the Center Parkway project. ECF No. 88-37 at 3. As
10 such, Wimbish concludes, UP was in breach of their agreement “due to TCRY’s
11 clearly-stated and ongoing opposition to the Center Parkway project.” ECF No. 88-37
12 at 3.

13 **6. Procedural history**

14 Plaintiffs brought this action on June 5, 2017, asserting a *Qui Tam* action under
15 31 U.S.C. §§ 3729-3737 based on alleged “false or fraudulent claims” and “false
16 records and statements” used “to obtain payment (and double payment or approval for
17 payment in violation of the Federal False Claims Act” ECF No. 1 at ¶ 5.1.
18 Because Plaintiffs asserted a Federal False Claims Act cause of action, the United
19 States of America was provided with notice and an opportunity to intervene. *See* ECF
20 No. 2. On May 25, 2018, the United States of America declined to intervene. ECF

1 Nos. 9; 10.

2 Plaintiffs filed an Amended Complaint (ECF No. 6) on April 2, 2018, and a
3 Second Amended Complaint (ECF No. 13) on June 13, 2018. In the First Amended
4 Complaint, Plaintiffs reasserted the original *Qui Tam* claim and asserted a host of new
5 actions, including, *inter alia*, claims that Defendants the Port and the City of Richland
6 retaliated against TCRY based on TCRY's protected activity. In the Second Amended
7 Complaint, Plaintiff merely adds more detail to the underlying allegations, but the
8 causes of action remained the same. *Compare* ECF No. 6 with ECF No. 13.

9 Recently, Peterson and TCRY requested the Court enter partial summary
10 judgment holding the Port "liable for retaliating against Peterson and TCRY (for
11 associating with Peterson) for Peterson's petition against the Port for unconstitutional
12 conduct." ECF No. 61 at 2. The Court denied the motion. ECF No. 85.

13 Now, Peterson and TCRY request the Court enter partial summary judgment
14 holding the City of Richland liable for alleged retaliation based on TCRY's petition to
15 the STB. ECF No. 87. This Motion is now before the Court.

16 **STANDARD OF REVIEW**

17 A movant is entitled to summary judgment if "there is no genuine dispute as to
18 any material fact and that the movant is entitled to judgment as a matter of law." Fed.
19 R. Civ. P. 56(a). A fact is "material" if it might affect the outcome of the suit under
20 the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An

1 issue is “genuine” where the evidence is such that a reasonable jury could find in favor
2 of the non-moving party. *Id.* The moving party bears the “burden of establishing the
3 nonexistence of a ‘genuine issue.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330
4 (1986). “This burden has two distinct components: an initial burden of production,
5 which shifts to the nonmoving party if satisfied by the moving party; and an ultimate
6 burden of persuasion, which always remains on the moving party.” *Id.*

7 Per Rule 56(c), the parties must support assertions by: “citing to particular parts
8 of the record” or “showing that the materials cited do not establish the absence or
9 presence of a genuine dispute, or than an adverse party cannot produce admissible
10 evidence to support the fact.” Only admissible evidence may be considered. *Orr v.*
11 *Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The nonmoving party may
12 not defeat a properly supported motion with mere allegations or denials in the
13 pleadings. *Liberty Lobby*, 477 U.S. at 248. The “evidence of the non-movant is to be
14 believed, and all justifiable inferences are to be drawn in [the non-movant’s] favor.”
15 *Id.* at 255. However, the “mere existence of a scintilla of evidence” will not defeat
16 summary judgment. *Id.* at 252.

17 DISCUSSION

18 Plaintiffs request summary judgment against the City of Richland for violation
19 of Plaintiff TCRY’s First Amendment right to be free from retaliation against
20 protected free expression. ECF No. 87. Defendants the City of Richland and the Port

1 of Benton oppose the Motion, arguing Plaintiffs have not demonstrated that the City of
2 Richland took any adverse action against TCRY in retaliation for protected speech,
3 among other things. ECF Nos. 91; 95. The Court agrees with Defendants.

4 “To state a claim for First Amendment retaliation against a government official,
5 a plaintiff must demonstrate that ‘(1) he engaged in constitutionally protected activity;
6 (2) as a result, he was subjected to adverse action by the defendant that would chill a
7 person of ordinary firmness from continuing to engage in the protected activity; and
8 (3) there was a substantial causal relationship between the constitutionally protected
9 activity and the adverse action.’” *Mulligan v. Nichols*, 835 F.3d 983, 988 (9th Cir.
10 2016) (quoting *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010)).

11 Plaintiffs argue TCRY engaged in protected speech when “TCRY brought a
12 petition before the STB to enforce its leasehold rights and prevent an unlawful
13 condemnation of its property.” ECF No. 87 at 12. Plaintiffs assert the City of
14 Richland retaliated against TCRY because of this protected conduct. In support,
15 Plaintiffs point to (1) the Southern Connection Options List, ECF No. 87 at 6; (2) the
16 City of Richland informing UP of its breach of contract based on TCRY’s opposition
17 to the Center Parkway crossing, ECF No. 87 at 10; and (3) statements in e-mails
18 written by Wimbesh (*i.e.* referring to TCRY as “TCRY f’er”, stating “I don’t want to
19 give them a damn thing”, and stating “this is the last of ‘em””), ECF No. 87 at 10; ECF
20 No. 101 at 6. The Court finds Plaintiffs have not met their burden in requesting

1 summary judgment, as the evidence does not demonstrate the necessary retaliatory
2 intent, especially under the lens of summary judgment.

3 1. **Options List**

4 Plaintiffs' motion relies heavily on their contention that the City of Richland,
5 through the firm Fletcher & Sippel, created the "Southern Connection Options List"
6 out of retaliation for TCRY petitioning the STB for a declaratory order. ECF No. 89 at
7 10, ¶ 34. Remarkably, however, Plaintiffs do not provide any evidence that the City of
8 Richland had any role in creating the Options List.

9 Contrary to Plaintiffs' assertions otherwise, the evidence demonstrates the City
10 of Richland had nothing to do with the Options List and the Options List had nothing
11 to do with the Center Parkway crossing. As the City of Richland notes, "on March 11,
12 2016, Mr. Wimbish sent an email to two Port employees and several Tangent Services
13 employees—but *no one at the City*—explaining: 'I am working . . . in support of
14 Tangent Services, Inc., to develop and to *provide to the Port of Benton* (the 'Port') a
15 list of possible options for the future use of the so-called 'Southern Connection' . . .'"
16 ECF No. 91 at 8 (emphasis own). Further, in the e-mail, Wimbish refers to the
17 commercial and legal relationship among the Port, BNSF, TCRY and UP, but does not
18 mention the City of Richland or request any information related to the City of Richland
19 or the Center Parkway crossing. *See* ECF Nos. 88-25 at 2; 91 at 9-10. In their Reply,
20 Plaintiffs attempt to tie the City of Richland to the Options List by asserting that (1)

1 “Tangent, the City of Richland, and the Port of Benton met on September 1, 2016 and
2 discussed TCRY and options” and (2) “Tangent’s bill to analyze ending TCRY was
3 split between the City of Richland and the Port of Benton.” ECF No. 101 at 5. In
4 support, Plaintiffs rely on a disputed e-mail and a billing statement, and even if the
5 Court were to consider this, it only shows the parties met with the firm, not that they
6 discussed the Options List.

7 Importantly, even if the City of Richland took part in creating the Options List
8 or otherwise discussed ways of dealing with TCRY, there is still no concrete evidence
9 this was done out of retaliation (let alone out of retaliation for petitioning the STB),
10 especially bearing in mind the fact that the Parties have a long, contentious history.
11 Notably, Plaintiffs assert that “Fletcher & Sippel . . . laid out a plan of retaliation via
12 email that was *expressly intended* to retaliate against TCRY for asserting its right[,]”
13 ECF No. 87 at 13 (emphasis own), but Plaintiffs conspicuously fail to identify the
14 allegedly “express” language of retaliatory intent. Plaintiffs also assert that the City
15 launched its plan of sabotage (i.e., the Options List) two days after the STB ruled in
16 TCRY’s favor, ECF No. 87 at 14, but the timing is a red herring. Although the STB
17 ruled on August 12, 2016 and the Options List was allegedly distributed to the Port
18 around that time, it is not disputed that (1) the Options List was a product of several
19 months of planning and work, beginning in January of that year, and (2) TCRY filed
20 the petition in March of 2015—undermining Plaintiffs attempt to imply retaliation

1 based on timing.

2 Finally, merely discussing options – even if discussing how to retaliate – does
3 not amount to retaliation absent concrete action. *Blair v. Bethel Sch. Dist.*, 608 F.3d
4 540, 543 n.1 (9th Cir. 2010) (an adverse act is “an act that is reasonably likely to deter
5 [the plaintiff] from engaging in constitutionally protected speech.” (quoting *Coszalter
6 v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003)). It is undisputed TCRY only
7 learned of the Options List after receiving the records via a public records request, so
8 the Options List cannot be viewed as an adverse action.

9 **2. City of Richland informing UP of breach**

10 Plaintiffs point to one concrete action taken by the City of Richland. In July
11 2017, Wimbish wrote to UP’s attorney Berman informing him that UP was in breach
12 of the 2011 SFRTUA between the City of Richland and UP based on TCRY’s
13 opposition to the Center Parkway crossing (the 2011 SFRTUA required UP and its
14 agents to not object to the Center Parkway project, as noted above). It is true the City
15 of Richland informed UP of its breach based on TCRY’s objection to the project.
16 However, there is nothing to suggest the City of Richland did so out of retaliation for
17 TCRY’s STB petition, as opposed to pursuing the long-stated goal of installing the
18 Center Parkway crossing.

19 Importantly, TCRY’s protected conduct – filing the petition with the STB in
20 2015 – occurred long after the City of Richland and UP entered the 2011 SFRTUA.

1 Although the City of Richland pursued its contractual rights *after* TCRY filed the STB
2 petition, (1) the relevant e-mail was sent approximately two years after TCRY filed the
3 petition and one year after the STB ruled in TCRY's favor—a significant gap in time
4 between the protected conduct and the complained-of action, and (2) the conduct is
5 entirely consistent with plans dating back to 2001 and accords with the 2011 SFRTUA
6 declaration stating that “the City desires that all railroad interchange operations at
7 Richland Junction be permanently eliminated to facilitate commercial development
8 and improve vehicular traffic movement in the area[.]” ECF Nos. 89 at 5, ¶ 16; 88-17
9 at 2.

10 Under the lens of summary judgment, the Court cannot say the notice of breach
11 was sent out of retaliation.

12 **3. Rejection of TCRY offer of acceptance; last of ‘em e-mail**

13 Plaintiffs argue the “undisputed rejection of TCRY’s acceptance of the Center
14 Parkway Project on September 12, 2017” is evidence of retaliation. ECF No. 101 at 5.
15 Plaintiffs appear to be referencing TCRY’s offer to accept the City of Richland’s
16 proposed Center Parkway crossing design, where counsel for TCRY, William C.
17 Schroeder, wrote to Berman, stating: “the City’s most recent proposed design as to
18 Center Parkway is acceptable, conditioned upon payment of my client’s costs and
19 fees.” ECF Nos. 93 at 18, ¶ 61; 88-42. As for the “rejection”, Plaintiffs point to an e-
20 mail sent on September 13, 2017 from Wimbish to Berman where Wimbish refers to

1 TCRY as "TCRY F-ers" and states "I don't want the City to give [TCRY] a damn
2 thing aside from funds related to crossing upkeep and signal maintenance." ECF No.
3 101 at 6.

4 The e-mail by Wimbish was written in response to Berman e-mailing Wimbish
5 in order to (1) inform him that TCRY found the design proposal for Center Parkway
6 acceptable and (2) ask whether Wimbish or the City of Richland heard anything about
7 this from TCRY. ECF No. 88-44 at 3. In response, Wimbish wrote:

8 I've not heard anything about movement on Center Parkway. That part of
9 your message is news to me.

10 What I do know is that TCRY has, to my client's surprise softened its stance
11 on the Duportail crossing, as you have mentioned. TCRY is still holding out
12 for a cash payout, as it always does, even though I believe that Duportail
13 only involves modification to an existing crossing. I understand that
14 TCRY's low-six-figure demand is a serious change in posture, and it may
15 well be that the City would be inclined accept on Duportail in the interest of
16 evading a larger dispute with the short line. Incidentally, I don't think
17 Richland should have to pay TCRY (a non-owner, tenant railroad) anything
18 for Duportail. I am recommending that Richland hold off on any further
19 negotiations on Duportail until we hear more.

20 My guess is that TCRY will demand money (again, low six figures or so,
15 possibly more) for Center Parkway, just agree to the crossing without
16 putting up a fight. I don't want the City to give them a damn thing aside
17 from funds related to crossing upkeep and signal maintenance (as
18 compensation for the upkeep and maintenance of the crossing and signals
19 strike me as reasonable). You can rest assured that those TCRY F-ers will,
20 after settlement, move on to the tactic of purposely blocking the new Center
Parkway crossing just to annoy the City and make some new demand, such
as exclusive access to the Horn Rapids Spur (something they've tried to
secure before, by the way).

1 ECF No. 88-44 at 2-3.

2 According to Plaintiffs, the “City of Richland’s refusal in September 2017 to not
3 give[] ‘a damn thing’ to TCRY was motivated by its stated desire to chill TCRY’s
4 speech.” ECF No. 101 at 6. Plaintiffs simply point to ECF No. 89 at 17, ¶ 60, which
5 is merely a short recitation of a portion of the underlying e-mail (included above).
6 Upon a more complete review, the e-mail merely reflects the desire that TCRY not
7 oppose the Center Parkway crossing, which is harmless in light of the context.
8 Plaintiffs also grab hold of the word “demand” and argue “[t]he City of Richland
9 specifies that not giving TCRY a ‘damn thing’ was to prevent TCRY from making
10 ‘some new demand.’” ECF No. 101 at 6. This reading strains credulity and is patently
11 contradicted by the e-mail itself—there is no discussion about preventing TCRY from
12 making a new demand; the comment reflects Wimbish’s view that TCRY enters into
13 agreements and subsequently makes new demands.

14 Contrary to Plaintiffs’ representations, the comment to not give TCRY “a damn
15 thing aside from funds related to crossing upkeep and signal maintenance” apparently
16 refers to the “Duportail Crossing”, as Wimbish notes in the e-mail that he “had not
17 heard anything about movement on Center Parkway”—suggesting he did not know
18 about TCRY’s offer of acceptance sent to Berman the previous day.

19 Plaintiffs otherwise assert that Wimbish “went so far as to refer to TCRY as
20 ‘those TCRY F-ers’ when he threatened UP with litigation” ECF No. 87 at 13.

1 This statement is patently false. The City of Richland did not threaten UP with
2 litigation in the July 26, 2017 e-mail—although Wimbish does outline that the City
3 may terminate the agreement and enter a new agreement that does not allow TCRY to
4 act as UP’s agent. ECF No. 88-37 at 4 (“if UP chooses not to act to remedy the
5 situation, Richland will give formal notice of breach. If UP fails to cure, we will
6 proceed to invoke the City’s termination rights” but would “be inclined to offer UP
7 access to the Horn Rapid Spur on virtually identical terms” except that UP would be
8 prohibited “from designating an agent”).

9 Plaintiffs’ also point to another statement by Wimbish in an e-mail from
10 Wimbish to Heather Kintzley, an attorney for the City of Richland. ECF No. 87 at 14.
11 In the e-mail, Wimbish forwards the September 13, 2017 e-mail (from Wimbish to
12 Berman) to Kintzley with one sentence stating: “This is the last of ‘em.” ECF No. 88-
13 44 at 2. Plaintiffs insinuate that this statement is made in reference to UP opting to
14 terminate TCRY as its handling agent and suggest the statement is evidence of
15 retaliatory intent. However, as the City of Richland asserts, this characterization “is
16 wrong.” ECF No. 91 at 13.

17 As the City of Richland explains, the e-mail was sent before UP terminated the
18 agency agreement and the comment was made in reference that it was the last e-mail
19 being forwarded:

20 Mr. Wimbish forwarded the email to Ms. Kintzley on September 22, 2017—
several months before UP ended its agency relationship with TCRY. TCRY

had made a public records request seeking communications between Mr. Wimbish and UP, so Ms. Kintzley asked Mr. Wimbish to send her responsive emails. He forwarded 17 total emails on September 22, 2017. The “last of ‘em” email was the last email Mr. Wimbish forwarded that day. TCRY obtained those emails on October 11 and October 25, 2017, in response to its public records request.

The suggestion that Mr. Wimbish intended to refer to getting rid of TCRY rather than that Mr. Wimbish was informing Ms. Kintzley that he was done sending responsive emails, is absurd in the true context of the email.

ECF No. 91 at 13-14. Plaintiffs have not provided any evidence to discount this explanation and have provided no affirmative evidence of retaliatory intent otherwise. While Plaintiffs may object to being referred to as TCRY F-ers, the moniker only demonstrates the acrimonious relationship between the Parties that evolved over years of disputes.

4. Conclusion

In sum, despite Plaintiffs’ mostly-bald assertions otherwise, the evidence does not establish the City of Richland took any action out of retaliation against TCRY. Plaintiffs point to (1) an Options List that was not created by the City of Richland and has nothing to do with the Center Parkway crossing, (2) the City of Richland pursuing its contractual rights towards a well-defined goal established in 2001, and (3) off-hand comments – taken out of context – that merely demonstrate the attorney for the City of Richland viewed TCRY as unscrupulous, at most. As such, despite claiming the existence of “express” language detailing such, Plaintiffs have failed to present any

1 concrete evidence of retaliatory intent. ECF No. 87 at 13.

2 At least under the lens of summary judgment, the evidence shows the City of
3 Richland, in conjunction with the City of Kennewick, simply proceeded with the long-
4 stated goal of installing the Center Parkway crossing—a goal that was conceived
5 before TCRY even acquired its leasehold interest in the Southern Connection trackage.

6 Having failed to produce any evidence of retaliatory intent, Plaintiffs have not
7 demonstrated summary judgment is proper. *See Braxton-Secret v. Robins Co.*, 769
8 F.2d 528, 531 (9th Cir. 1985).

9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 1. Plaintiffs Randolph Peterson and Tri-City Railroad Company, LLC's Motion for
11 Partial Summary Judgment (ECF No. 87) is **DENIED**.
12 2. Plaintiffs' Motion to Strike City of Richland Sur-Reply (ECF No. 104) and
13 Motion to Expedite (ECF No. 105) are **DENIED** as moot.

14 The District Court Executive is directed to enter this Order and furnish a copy to
15 the parties.

16 **DATED** May 17, 2019.



17 A handwritten signature in blue ink that reads "Thomas O. Rice".
18 THOMAS O. RICE
19 Chief United States District Judge
20